No. 71-897

In the Supreme Court of the United States

OCTOBER TERM, 1971

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The court of appeals did not write an opinion (see Pet. App. A2). The decision and order of the National Labor Relations Board (Pet. App. A4-A41) are reported at 185 NLRB No. 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A3) was entered on October 13, 1971. The peti-

tion for a writ of certiorari was filed on January 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the union picketed a jobsite with an object of forcing the Board of Education, a neutral, to cease doing business with a painting contractor with whom the union had a primary dispute.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at page 3 of the petition.

STATEMENT

A. The Board's Findings of Fact

From August 1, 1965, to July 31, 1968, Delta Company, a commercial painting contractor, was bound by a collective bargaining agreement between petitioner and the Association of Master Painters and Decorators of the City of New York. In September 1968, Delta and petitioner agreed to adhere to the provisions of the prior agreement; Delta also agreed to execute a new, independent agreement as soon as it was prepared by petitioner. Subsequently, petitioner submitted the new agreement to Delta, but Delta refused to sign because it disputed petitioner's claim that it owed $26,000 for pension and fringe benefits under pre-existing contracts (Pet. App. A11).

Meanwhile, in July 1968, Delta contracted with the Board of Education for the City of New York to do certain painting, finishing, and incidental repair work at a school in Brooklyn, P.S. 228 (Pet. App. A11). While Delta began the carpentry work in the latter part of 1968, the painting work was delayed due to the over-crowded condition of the school (Pet. App. A12).

In early January 1969, petitioner sent a letter to the Board of Education complaining that Delta "was not paying the prevailing rate and fringe benefits" (Pet. App. A12; A. 247).[1] At a meeting called by Martin, the Director of Maintenance for the Board of Education, petitioner claimed that Delta owed it $26,000, consisting of unpaid employee fringe benefits and fines (A. 41-42, 249). Delta disputed the amount, but indicated that, if it could be shown that it owed the money, it would pay. The meeting concluded with the understanding that the parties would attempt to resolve their problem (Pet. App. A12-A14).

After Delta began the painting work in June 1969 (Pet. App. A12), Beard, petitioner's business agent, advised two Delta painters at work at the school that Delta was "unfair" and that they should stop working, which they did (Pet. App. A17-A18). When Delta's general manager arrived at the site, he protested Beard's action and informed him that the company would hire men from a different union to per-

[1] "A." refers to the appendix to the briefs in the court below.

form the work (Pet. App. A18). Beard then informed Francescani, a Board of Education maintenance head, that Delta had not settled its problems with petitioner and that, if Delta continued to work there, petitioner would picket the school (Pet. App. A18-A19; A. 11).

That afternoon, Francescani received a telephone call from Blum, administrative aide to the union's secretary-treasurer. Blum reiterated Beard's earlier warning (Pet. App. A19; A. 11-12, 145-146). In response to Francescani's request for something in writing (Pet. App. A19; A. 12), petitioner wrote the Board of Education that (Pet. App. A19-A20, n. 13; A. 204):

> We are resuming our request that * * * [Delta] be declared a non-responsive employer. * * *
>
> Furthermore, we are notifying you of our intent to take necessary economic action at any location at which we find this employer working. Specifically, we intend to picket the job site at P.S. No. 228 in Brooklyn where we are informed that this company might resume work for your organization.

Following receipt of the letter, the Board of Education notified Delta to stop working until a settlement could be reached (Pet. App. A19-A21). Petitioner subsequently sent a telegram to the Board of Education confirming its intent to picket and requesting that the Board cancel its contract with Delta (Pet. App. A21; A. 205).

On July 17, 1969, Delta informed Martin, the Board of Education's Director of Maintenance, that it had

subcontracted the painting work to Strip Clean,[2] which had a collective bargaining agreement with another union (A. 66-67, 120-122). When Martin subsequently told petitioner's agent Blum that Delta had subcontracted the work to Strip Clean and suggested that the dispute now appeared to be a "jurisdictional" one which the parties should resolve through the proper labor channels rather than through the Board of Education, Blum replied that Strip Clean was merely the alter-ego of Delta and that petitioner was going to go ahead with the picketing (Pet. App. A21-A22; A. 46). On July 29 and August 14, petitioner sent further letters to the Board requesting cancellation of Delta's contract and threatening picketing (Pet. App. A23-A25, A26-A28; A. 206-211).

On August 15, the Board of Education advised Delta by letter that it could resume work using Strip Clean, but that, if picketing occurred, the Board might take action under a provision of its contract with Delta prohibiting Delta from carrying out the contract in a way that might cause a strike (Pet. App. A25-A26; A. 213-214). Strip Clean resumed work at P.S. 228 under its subcontract with Delta on August 18 (Pet. App. A28). On September 2, petitioner's business agent, Beard, visited the P.S. 228 jobsite and determined that Strip Clean was employing painters who were members of the other union. Petitioner be-

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[2] The parties stipulated that Strip Clean was either an ally of Delta or doing the struck work of Delta (Pet. App. A32, n. 19).

gan picketing at the school on September 4 and continued until October 10 (Pet. App. A28-A29).[3]

B. The Decisions Below

The Board found that petitioner's primary dispute was with Delta, that the Board of Education was a neutral with respect to that dispute and that, although the picket signs mentioned only Delta,[4] an objective of the picketing was to force the Board of Education to cancel its contract with Delta (Pet. App. A29, A37). In making the latter finding, the Board reasoned (Pet. App. A35-A36):

> Here, the picketing does not stand in isolation. It was preceded by the aforementioned communications which sought to involve, and did involve, the Board of Education in [petitioner's] labor dispute with Delta, and, during these communications, [petitioner] foretold its intention to picket the school, without restriction or limitation, in the event of the failure to resolve the labor dispute, and clearly indicated the objective, because of such failure, of having the Board of Education cancel its contract with Delta and cease doing business with Delta. * * *

Accordingly, the Board concluded that petitioner threatened and coerced the Board of Education for an object of forcing it to cease doing business with Delta,

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[3] On October 31, the United States District Court for the Southern District of New York enjoined the picketing pursuant to Section 10(*l*) of the National Labor Relations Act (Pet. App. A16).

[4] The legend on the signs is set forth at Pet. App. A29.

in violation of Section 8(b)(4)(ii)(B) of the Act (Pet. App. A37). The Board entered an appropriate remedial order (Pet. App. A39-A40).

The court of appeals enforced the Board's order (Pet. App. A1-A3).

ARGUMENT

The question raised in the petition (Pet. 2)—whether a union has a right to appeal to a governmental agency for redress of grievances—is not presented here. The Board found, and the court of appeals sustained its finding, that petitioner picketed the Board of Education, not for the purpose of persuading that agency to comply with its own contractual policies and state law,[5] but to compel it to cease doing business with Delta because of petitioner's dispute with that company. Accordingly, the only question presented is whether this finding is supported by substantial evidence. Such an issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 491. In any event, the facts summarized above show that there is ample support for the Board's finding.[6]

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[5] Petitioner contended that Delta was in violation of state law in refusing to pay the sums allegedly due in respect to pension, welfare and related benefits.

[6] As the Board pointed out (Pet. App. A36-A37):

> [T]he picket signs made no mention that the picketing was for the purpose of eliciting a public response to an alleged failure of the Board of Education to enforce a contract it had with Delta, with respect to Delta's violation of New York state law. Indeed, the only reference

The case relied on by petitioner (Pet. 6-7), *National Labor Relations Board* v. *Local 254, Building Service Employees Int'l. Union*, 376 F. 2d 131 (C.A. 1), is not to the contrary. In that case, the First Circuit declined to predicate a finding of civil contempt for violation of a prior decree on picketing by the union at a building occupied by the Massachusetts Department of Education. The court found that the objective of the picketing there was not entirely clear because it may have had the "primary" objective of protesting the Department's general policies concerning the letting of contracts, rather than the "secondary" objective of causing the Department to cease doing business with the primary employer (*id.* at 135). Here, however, the Board found, on the basis of substantial evidence, that petitioner's basic dispute was with Delta; its sole dispute with the Board of Education was due to the Board's failure to cancel its contract with Delta.

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thereon was to [petitioner's] labor dispute with Delta. And * * * in the one instance during [petitioner's] communications to the Board of Education in which it made mention of its role as a public citizen in making its demand upon the Board of Education to cancel its contract with Delta, [petitioner] indicated that its demand was also prompted by its own direct involvement in a labor dispute with Delta. * * *

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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